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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~982.~~ ~~662~~ ~~601~~ 114

EDWARD L. KEYES, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition.—Filed Feb.* 2, 1880.

United States Court of Claims.

EDWARD L. KEYES
vs.
THE UNITED STATES. } No. 12148.

The petition of Edward L. Keyes respectfully shows that he is a citizen of the United States, resident at Boston, in the State of Massachusetts.

That on the 28th day of April, 1877, he was, and for a long time prior thereto had been, second lieutenant in the Fifth Cavalry, in the Army of the United States, duly appointed as such according to law.

That since the said 28th day of April he has been, and still is, such second lieutenant.

That there is now due your petitioner, for his pay as such second lieutenant during the time last aforesaid, the sum of four thousand two hundred and thirty-six dollars and thirty-six cents.

Your petitioner further shows that he is the owner of said claim; that no assignment or transfer of said claim, or of any part thereof, or interest therein, has been made; that he is justly entitled to the amount above claimed from the said United States, after allowing all just credits and set-offs.

Your petitioner further shows that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion
2 against the said government; and that he believes the facts stated in this his said petition to be true.

Wherefore your petitioner prays judgment for the said sum of four thousand two hundred and thirty-six dollars and thirty-six cents, together with costs.

EDWARD L. KEYES,
By his attorney in fact, JOHN W. BELL.

I, John W. Bell, of Washington, D. C., attorney in fact of Edward L. Keyes, petitioner aforesaid, do depose and say that I am one of the attorneys in fact of said petitioner; and that he (the said petitioner) is the lawful owner of said claim, and that no assignment or transfer of said claim, or any part thereof, has been made to the knowledge or belief of this deponent; that I have read the foregoing petition, and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

JOHN W. BELL.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Personally appeared the above-named John W. Bell, and made oath that the above petition, by him subscribed, is true, according to the best of his knowledge and belief.

Sworn and subscribed before me this 29th day of January, A. D. 1880.

[SEAL.] N. CALLAN,
Notary Public.

Post-office of counsel: Washington, D. C.

Post-office of claimant: Valley Home, Back Creek Valley, Frederick County, Virginia.

Power of attorney.

Know all men by these presents, that I, Edward L. Keyes, of Fort Concho, Bexar County, in the State of Texas, have made, constituted,
3 and appointed, and by these presents do make, constitute, and appoint Matt H. Carpenter, James Coleman, and John W. Bell, of Washington, D. C., my true and lawful attorneys, irrevocable, for me and in my name, place, and stead, hereby annulling and revoking all former powers of attorney or authorizations whatever in the premises, to collect from the United States Government the sum of eighteen hundred dollars, more or less, due me as a second lieutenant in the fifth regiment of cavalry, United States Army, and of which amount I have been unjustly and illegally deprived, and to, from time to time, furnish any further evidence necessary or that may be demanded, giving and granting to my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, and to receipt and sign all vouchers, hereby ratifying and confirming all that my said attorneys or their substitute may or shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I hereunto set my hand and seal this twenty-eighth day of June, eighteen hundred and seventy-eight.

EDW'D L. KEYES. [SEAL.]

D. H. BRAGOMI.
W. H. CALVERT.

STATE OF VIRGINIA,
City of Winchester, ss:

Be it known, that on this 28th day of June, in the year eighteen hundred and seventy-eight, before me, the undersigned, a notary public, in and for said city and State, personally appeared Edward L. Keyes, to me well known to be the identical person who executed the foregoing letter of attorney, and the same having been first fully read over to him, and the contents thereof duly explained, acknowledged the same to be his act and deed; and that I have no interest, present or prospective, in the claim.

In testimony whereof, I have hereunto set my hand and affixed my seal of office the day and year last above written.

[SEAL.] W. L. POWELL,
Notary Public.

4 II. *Traverse.—Filed Feb.* 2, 1880.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 III.—*Findings of fact and conclusion of law.*—*Filed June* 7, 1880.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

On the 27th day of July, 1872, the claimant was appointed second lieutenant in the Fifth Regiment of Cavalry, and on the 5th day of August, 1872, he accepted said appointment.

II.

At the time of the occurrence of the matters hereinafter set forth, Wesley Merritt was colonel of said regiment.

III.

On the 1st day of February, 1877, under orders issued by command of Brigadier-General Crook, commanding the Department of the Platte, a general court-martial met at Cheyenne, Wyo., and the following officers were by said orders detailed to compose said court, all of whom were present when the court met, to wit: Col. John H. King, Ninth Infantry; Col. John E. Smith, Fourteenth Infantry; Col. Franklin F. Flint, Fourth Infantry; Col. Wesley Merritt, Fifth Cavalry; Lieut.-Col. Luther P. Bradley, Ninth Infantry; Maj. Montgomery Bryant, Fourteenth Infantry; Maj. Henry G. Thomas, Fourth Infantry; Capt. Andrew S. Burt, Ninth Infantry; Capt. Edwin M. Coates, Fourth Infantry; First Lieut. Leonard Hay, adjutant Ninth Infantry, judge-advocate.

IV.

Before the said court the claimant was put on trial; and having been called before the court, and heard the order appointing it read, was asked if he had any objection to any member of the court present named in the order, to which he replied in the negative.

V.

The claimant having no objection to offer to any member of the court, the court was then duly sworn by the judge-advocate, and the judge-advocate was duly sworn by the president of the court; all of which oaths were administered in the presence of the accused.

VI.

The claimant was then duly arraigned upon four charges and specifications; the first three of which were preferred by Lieut. Col. E. A. Carr, Fifth Cavalry, and the fourth by the said Col. Wesley Merritt.

6 VII.

On the trial the accused was, by leave of the court, represented by counsel of his own selection.

VIII.

When arraigned, the accused pleaded not guilty to all of said charges and specifications.

IX.

The trial then proceeded, and the said Col. Wesley Merritt was sworn as a witness on the part of the government, and gave testimony in support of the charge and specifications preferred by him, but gave no testimony in regard to the charges and specifications preferred by Lieut. Col. E. A. Carr.

X.

The day after the accused pleaded not guilty to all the charges and specifications as aforesaid, he asked leave of the court to withdraw that plea as to the first and second specifications of the second charge, and as to that charge; and to enter a plea of guilty thereto; and such leave was given him; and thereupon he entered a plea of guilty accordingly.

XI.

The said Col. Wesley Merritt was not examined further as a witness in the cause than as above stated, but he continued to sit as a member of the court thoughout the trial, and participated in rendering the final judgment of the court in the case.

XII.

At the close of the evidence the accused submitted to the court, in writing, a statement of his defense, which was read to the court. It contained no objection or reference to the participation of Col. Wesley Merritt as a member of the court in the trial, or to his having been sworn and examined as a witness on behalf of the government, as aforesaid.

XIII.

The court found the accused guilty of all the aforesaid charges and specifications, and sentenced him to be dismissed from the service.

XIV.

The proceedings, findings, and sentence of the court were approved by the President of the United States, who ordered that the sentence should take effect on the 28th day of April, 1877.

XV.

On the 27th of June, 1877, the Senate not being in session, the President appointed Henry J. Goldman, of New York, to be second lieutenant, Fifth Regiment of Cavalry, and on the 15th of October, 1877, the President nominated the said Goldman to the Senate for appointment as second lieutenant in said regiment, vice Keyes, dismissed, to
7 date from June 15, 1877; and the Senate advised and consented

to the said appointment of said Goldman; and he was accordingly commissioned, and still holds the office of such second lieutenant.

Upon the foregoing facts the conclusion of law is that the claimant's petition should be dismissed upon the grounds set forth in the following

IV.—*Opinion.*

DRAKE, Ch. J., delivered the opinion of the court:

The claimant's demand rests upon the assumption that ever since the 28th of April, 1877, he has been, and still is, a second lieutenant in the Fifth Regiment of Cavalry, in the United States Army, and is entitled to pay as such from that day to the present time.

On that day, pursuant to the sentence of a court martial, approved by the President, he was dismissed from the service. He claims that his dismissal was a nullity, because the court-martial had no jurisdiction to try him, and therefore that its sentence was void and did not authorize his dismissal.

He bases this position not on any illegality in the convening of the court, nor upon the omission of any act or proceeding legally necessary to its due constitution as a court-martial, but upon the fact that Colonel Merritt, who had preferred the fourth charge and specifications against him, and was sworn as a witness on the part of the government to sustain that charge, sat throughout the trial and participated in the judgment of the court.

The whole record of the court-martial is before us, and there is therefore no room for dispute as to the facts.

From that record it appears that before the members of the court were sworn in as such, the claimant heard the order convening it read, and was asked if he had any objection to any member of the court, to which he replied in the negative. This was a consent on his part to the participation of Colonel Merritt in the trial, and it is too late now for the claimant to insist—if, indeed, he could ever do so successfully—that the jurisdiction of the court was lost by the presence of that officer as one of its members. The case is analogous to a consent given by a defendant to be tried by a judge who is of kin to the opposite party, or by a jury, one of whom, when examined as to his qualifications as a juror, declared that he had formed and expressed an opinion that the defendant was guilty. In neither such case could it be effectively claimed that the jurisdiction of the court was lost.

If, then, the jurisdiction of the court-martial was not lost by the presence of Colonel Merritt as one of its members, its proceedings cannot in any way be impeached in this court; for no doctrine is better settled than that judicial proceedings can be assailed or questioned collaterally only when the court in which they occurred was without jurisdiction to take them (Thompson v. Tolmie, 2 Peters, 157; Voorhees v. Bank U. S., 10 Ibid., 449).

The claimant's petition must be dismissed.

NOTT, J., concurring:

I am of the opinion that when an officer has been removed and his successor appointed and confirmed, this court cannot inquire into the legality or regularity of his removal.

8 V.—*Final judgment.*

At a Court of Claims held in the city of Washington, on the 7th day of June, A. D. 1880, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimant, the said Edward L. Keyes, be dismissed.

9 VI.—*Application for and allowance of an appeal.*

The above-named claimant, Edward L. Keyes, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States, from a judgment rendered against him, and in favor of the defendants in the above-entitled cause, at the December term of the court, A. D. 1879, to wit, on the 7th day of May, 1880.

J. COLEMAN,
Att'y for Claimant.

Dated June 11, 1880.

Filed June 11, 1880.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

10 In the Court of Claims.

EDWARD L. KEYES
vs.
THE UNITED STATES. } No. 12148.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of claimant for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 18th day of June, 1880.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 982. Edward L. Keyes, appellant, vs. The United States. Court of Claims. Filed 14th October, 1880.

109-336

OFFICE SUPREME COURT U. S.
FILED
NOV 6 1893
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

No. 114.

EDWARD L. KEYES, Appellant,

vs.

THE UNITED STATES.

JAMES COLEMAN,
Of Counsel for Appellant.

THOMAS MCGILL & CO., PRINTERS, WASHINGTON, D.C.

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[SEAL.]

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THOMAS McGILL & CO., PRINTERS, WASHINGTON, D.C.

IN THE

Supreme Court of the United States.

EDWARD L. KEYES, Appellant,
vs.
THE UNITED STATES. } No. 114.

STATEMENT.

The claimant, on the 28th day of April, 1877, was, and for a long time prior thereto had been, second lieutenant in the fifth cavalry in the army of the United States.

While such second lieutenant he was charged with a violation of certain of the rules, regulations, and discipline of the army; a court-martial was convened; charges and specifications were preferred against him; he pleaded not guilty; a trial was had before the court-martial; the accused was convicted, and sentenced to dismissal from the army.

Colonel Wesley Merritt, one of the members of the court-martial, preferred one of the charges against the lieutenant, and was himself the sole and only witness in support of the charge. In short, one of the judges before whom the accused was being tried preferred the charge, testified against him, and sat in judgment in determining upon the question of his guilt or innocence.

Assignment of Error.

The court below erred in holding—

1. That the court-martial which tried the appellant had jurisdiction to try him.

2. That the fact that the appellant stated that he had no objection to the court was a consent upon his part that conferred jurisdiction upon the court to try him.

3. That the consent of the appellant could confer jurisdiction upon the court.

4. That the legality of the removal of the appellant from the office which he held could not be inquired into after the appointment of his successor.

ARGUMENT.

On hearing had before the Secretary of War, for the purpose of procuring the reinstatement of the lieutenant, after his dismissal from the service, the Judge Advocate-General, to whom the question had been referred, held "that the detailing upon courts-martial of officers who have preferred the charges, and who are expected to become witnesses, is not prohibited by any law or regulation, and is in practice not rarely resorted to in small commands, and does not vitiate the proceedings."

It is quite true that neither statute nor regulations contain such prohibition, either in regard to civil or military courts, and for the reason that the principle is so firmly seated in the human mind and so indispensable an element in the administration of justice in any system of jurisprudence, civil or military, as not to need statutory declaration; and it has been held in England, where Parliament is said to be omnipotent, that an act of Parliament cannot change this rule.

"An *act of Parliament* made against natural equity, as to make a man judge in his own cause, *is void in itself;* for *jura naturæ sunt immutabilia*, and they are *legis legum*."

Day v. *Savalge*, Hob., 85, 87; 5 *Exch.*, 671.

If this practice is "not rarely resorted to in small commands," then it is certain that the law is not rarely violated. But we shall show that it is error to hold that such practice does not vitiate the proceedings.

(1) It is well settled that courts-martial are courts of limited and special jurisdiction, and it is essential to their validity that it should be affirmatively shown that they acted upon a case *clearly* within their jurisdiction, and that their proceedings were strictly regular. No presumption can be indulged in favor of the validity of the judgment of such a court, and its judgment is everywhere treated *as a nullity*, unless the record affirmatively shows both jurisdiction and regularity of proceeding.

Greenleaf's Ev., vol. 3, sec. 470.
Duffield v. *Smith and others*, 3 Serg. & Rawle, 589.
Brooks v. *Adams*, 11 Pick., 440.
Mills v. *Martin*, 11 Johns., 7.
Brooks v. *Davis*, 17 Johns., 148.
Jones v. *Crawford*, 1 Johns. Case, p. 20, and cases cited.
Opinion of Attorney-General Rush, Opins., vol. 1, p. 177.
Sheldon v. *Sill*, 4 How., 441.
State v. *Gachenbemier*, 30 Ind., 63.
Ohio, &c., R. R. Co. v. *Shultz*, 31 Ind., 150.
State v. *Ely*, 43 Ala., 568.

(2) It is well settled that courts-martial, and every other statutory court, or courts of limited and special jurisdiction, must observe all the principles of the common law, except in so far as special statutes have imposed a different rule for such courts.

Greenleaf on Evidence, vol. 3, sec. 469, says:

"The tribunals of both civil and military courts are alike bound by the common law of the land in regard to the rules

of evidence, *as well as other rules of law*, so far as they are applicable to the manner of proceeding."

Note 3 to same says:

"The act for punishing officers and soldiers by martial law has only laid down such rules for the proceedings of courts-martial as have been intended to differ from the usual methods in the ordinary courts of law. It is therefore natural to suppose that when the act is silent it should be understood that the manner of proceeding of courts-martial should be regulated by that of the other established courts of judicature."

See also *Adye on Courts-Martial*, p. 45.

Benet on Courts-Martial, p. 244, says:

"It has been laid down as an indisputable principle, that whenever a legislative act erects a new judicature, without prescribing any particular rules of evidence to it, the common law will supply its own rules, from which it will not allow such newly-erected court to depart."

De Hart's Military Law, p. 322, says:

"But as the principle is acknowledged and prevails that in every instance in which forms of rules of proceeding before such courts have not been established by legal requirements, or settled by custom, the procedure must be in accordance with the practice which governs criminal trials in the ordinary courts of law."

See also *Mustratt's Case*, 2 MacArthur, 158.
Simmons on Courts-Martial, 485–487.

(3) There is certainly no statute or regulation which provides that an officer preferring charges, and being the only witness to establish the same, may sit as a judge for the trial of such charges, and pass upon the weight and effect of his own testimony. If, therefore, it can be shown that such fact, in a common-law court, would vitiate the proceedings, it must follow that these proceedings are void.

We shall cite authorities establishing the proposition we contend for in regard to civil courts, and also in regard to courts-martial.

Hickman's Law and Practice of Naval Courts-Martial, p. 246, says: "Officers who have been called upon to give evidence are not permitted to sit at trials."

De Hart's Military Law (pp. 122, 123) says: "It is an undoubted fact, however, that, as a rule, the appointing a commanding officer a member of a court-martial is bad, and should, if possible, be avoided, especially in cases where the person is serving with the commander of the regiment to which he belongs; it is possible that some prejudice may exist from previous, or imperfect, or *ex-parte* knowledge of the circumstances inducing the trial. *This, of course, applies to commanding officers of every description; that is, of posts and attachments as well as of regiments.*"

See also Harwood on Naval Courts-Martial, p. 21.

Benet on Military Law and Courts-Martial, p. 19, says:

"It has been held that when a general officer commanding an army makes the subject-matter of the charge, and places it in the hands of the judge-advocate, he must be deemed an accuser or prosecutor, and cannot legally *convene* a court-martial for the trial of the officer charged."

See also Scott's Digest Military Law, sec. 634.

Simmons' Practice Courts-Martial (p. 222) says:

"In December, 1828, a soldier of the 85th regiment was brought to a court-martial for attempting to steal the property of an officer who, by inadvertence, was placed as a member on the trial. The prisoner was found guilty; but, in the opinion of the Judge Advocate-General, the sentence was remitted from the circumstance of the officer to whom the property belonged being a member of the court-martial."

Hickman on Courts-Martial (chap. 1, p. 18) says: "*That no man can be a judge in his own cause, is such a rule of jus-*

tice that Lord Hobart ASSERTS IT TO BE MORE BINDING THAN EVEN AN ACT OF PARLIAMENT."

The proceedings of a court composed of judges or magistrates, either one of whom is interested in the result, directly or remotely, either by preferring charges against the accused or by appearing as a witness against him, is improperly constituted, and any *order* or *sentence made by them is void*, and it is no answer that a majority were in favor of the finding, or that the judge testifying did not testify upon the charges that were sustained.

Lord Denman, Chief Justice, in The Queen v. *The Justices of Hertfordshire*, 6 Adolphus & Ellis, 753, says: "We must take care that interested parties do not join in deciding cases." And Paterson, justice, in same case, says: "I think that it is very dangerous to allow an interested person to join, whether the majority turn on his vote or not. The magistrates discuss the question among themselves, and it is impossible to say what effect that discussion may have on the decision. The real question is, has an interested person taken any part at all?" And the court held: "If any one of the magistrates hearing a case at sessions be interested in the result, the court is improperly constituted."

Broom's Legal Maxims, 4th ed., pp. 119–122, says:

"It is, then, a rule always observed in practice, and of the application of which instances not unfrequently occur, that where a judge is interested in the result of a cause, he cannot, either personally or by deputy, sit in judgment upon it."

In *Stockwell* v. *White-Lake*, 22 Mich., 341, the court say:

"Every special tribunal appointed by law is subject to the maxim, that no person can sit as a judge in any cause in which he is a party, or in which he is interested."

3 *Chitty's Gen'l Pr.*, p. 9, says:

"Judges never act when there could be the *possibility of doubt* whether they would be free from bias."

"When the judge of probate had a valid claim against the estate of a deceased person, but had determined in his own mind not to enforce his claim, and exercised jurisdiction over the estate by granting letters of administration, it was held that he nevertheless was interested as a creditor of the estate, *and that the grant of administration was therefore void for want of jurisdiction.*" (*Sigourney et al.* v. *Sibley et al.*, 21 Pick., 101; see also *David Cottle, Appellant, &c.*, 5 Pick., 482; *Coffin* v. *Cottle*, 9 Pick., 287.)

In *Brooks* v. *Adams*, 11 Pick., 440, objection was made that the court-martial was not legally organized and authorized to act as a court-martial, because the judge advocate was not legally appointed, and the court said: "Had the individual assuming to act as judge advocate any legal right to perform the duties of that office? *If not, there was no legal tribunal, and the whole proceedings were coram non judice.*" (See also *Brooks* v. *Davis*, 17 Pick., 149.)

Hickman on Naval Courts-Martial, Appendix, pp. 246, 248, states a case which arose under the act 22 Geo., 2, ch. 33, sec. 11, which was referred by the Lords of the Admiralty to counsel for advice as to whether said act of Parliament, requiring that officers should be detailed upon the court who would have to be witnesses on the trial, must be observed. The opinion returned to the Lords Commissioners of the Admiralty was as follows:

"The usage of the service is very material upon this case, for naval courts-martial are evidently considered in the statutes concerning them as known and established courts; consequently, in matters not specially provided for, the settled course of proceeding must have great weight. That the character of *witness* and *judge* are not consistent, is very obvious; and though, in the common law of England,

there is *no challenge to a judge*, yet, in the only instance we know where judges were called upon to give evidence in a criminal case, it is observed *that they sat no more during the trial. By a strict and liberal construction of the statute* 22 *Geo.*, 2, *ch.* 33, *sec.* 12, *neither the prosecutor nor the prisoner would cease to be judges;* but this construction would *be absurd*, and the act must, from common sense, admit, as the usage is, that officers to whom there is a *just ground of exception*, or who have a just ground of excuse, *shall not be included in the number of those of whom the court is to be composed; consequently, if an officer entitled by his rank to sit as either prosecutor, party, or witness, the person next in seniority must supply his place; and the court so composed will be legally ruled according to the intent of the act.*

A. WEDDERBURN.
JAMES WALLACE.
F. C. CUST.

Thus it will be seen that the literal language of a statute was disregarded in deference to the general principle we are contending for, that no man can be prosecutor, witness, and judge in the same cause.

Broom's Legal Maxims, 2d Lond. ed., 1848, says, p. 84:

"It is a rule always observed in practice, and of the application of which instances not unfrequently occur, that, where a judge is interested in the result of a cause, he cannot either personally or by deputy sit in judgment upon it."

* * * * * * *

"Neither can a justice of the peace who is interested in a matter pending before the court of quarter sessions take any part in the proceedings," &c.

* * * * * * *

"In such a case it has recently been held that the presence of an interested magistrate will render the court improperly constituted and *vitiate the proceedings*, it being no answer to the objection that there was a majority in favor of the decision, without reckoning the vote of the interested party." * * * "Per Cur., 2 Stra., 1173; 12 Reps., 63–114, per Holt., C. J.; 1 Salk., 396; Chit. Gen'l Pr., vol. 3, p. 9; Co. Lit., 141*a*."

II.

It is claimed that

"It was the privilege of the accused to object to any member of the court."

Yes, it was his privilege; but his omission to exercise it conferred no jurisdiction upon the court. If the court, as constituted, was an improper court to pass upon the whole case, neither the silence of the respondent nor his written waiver or consent could confer jurisdiction or cure a defect in the organization of the court. A defendant in any criminal proceedings, either before a court-martial or common-law court, may remain silent during the trial, and subsequently raise any objection, well founded in law, to the judgment rendered against him or to the jurisdiction of the tribunal by which he was tried. It is a proposition that may be laid down without qualification, that consent cannot confer jurisdiction.

Mordecai v. *Lindsay*, 19 How., 199.
Montgomery v. *Anderson*, 21 How., 386.
Walker v. *Kynett*, 32 Iowa, 524.
Rice v. *State*, 3 Banks, (Kansas,) 142.
Lindsay v. *Mc Clelland*, 1 Bibb, 262.
Bents v. *Graves*, 3 McCord, 280.
Folby v. *People*, Breese, 31.
Falkenbrugh v. *Cramer*, Coxe, 31.
Parker v. *Munday*, Coxe, 70.
Ballance v. *Forsyth*, 21 How., 389.
Jackson v. *Ashton*, 8 Pet., 148.
R. R. Co. v. *Nelson*, 62 Mo., 585.
State v. *Judge, &c.*, 21 La. Ann., 258.

In *People* v. *Cancemi*, 7 Abb.'s Pr. Reps., 271, it was held by the Court of Appeals, in New York, in a case where the

mine any one charge made, it must follow that the sentence which rests upon the general conviction upon all the charges cannot be sustained. All the officers constituting the court must be presumed to have conferred together in regard to the judgment to be rendered and the sentence to be pronounced.

Suppose A to be indicted and charged in one count with stealing the horse of John Smith, and in another count to be charged with stealing the horse of William Jones—the judge of the court—and that the case proceeded to trial and the jury rendered a general verdict of guilty: it cannot be maintained that such judgment could be sustained. (*Queen* v. *The Justices of Hertfordshire*, 6 *Adolphus & Ellis*, 753, *and other cases before cited.*)

It cannot be known whether a majority of the court would have consented to the sentence of dismissal without conviction upon the charges and specification preferred by Col. Merritt. They entered into the case upon which the court passed sentence of dismissal. And if the court as constituted was incompetent to convict upon those charges, then sentence, which rested thereon, as well as upon the other charges, must be held to be *void.*

IV.

It is further said that—

"The accused pleaded guilty to one charge and several specifications, embracing very serious offenses, for which dismissal is the proper punishment."

(1) The punishment for the offenses to which he pleaded guilty is within the discretion of the court. (Art. 62, R. S., chap. 5, sec. 1342, p. 235.) And we submit that it would be an unwarrantable exercise of discretion, and without precedent, to dismiss the accused from the service for having been guilty of the charges preferred in the speci-

fication to which he pleaded guilty. At all events, it is impossible to say from this record that the court would have passed sentence of dismissal upon the charge and specifications to which he pleaded guilty. And even conceding that the court would have had *power* to pass such sentence upon such charge and specifications, it cannot be determined that they would have done, or did do so.

(2) But notwithstanding the accused confessed his guilt, and pleaded guilty, he is not estopped from now controverting the jurisdiction of the court before whom he was tried.

In *Duffield* v. *Smith and others*, 3 Serg. and Rawle, 589, which was an action of trespass against the officers composing a court-martial, where the defendants justified, &c., it was held (Tilghman, C. J.):

"The remaining point is that the plaintiff, having appeared before the court-martial and confessed his guilt, is estopped from now controverting its jurisdiction. A court-martial is a court of special and bounded jurisdiction. In order to make their proceedings valid they must act within their jurisdiction. Nor can the plea of the accused confer a jurisdiction, when it appears on the whole face of the proceedings that none existed. *I consider this principle as sufficiently established, to which I shall barely refer, without entering more minutely into the subject.*" (1 Saund., 73; 4 Dall., 11; 2 Wills., 385; 1 Freem., 322; 2 Mod., 29; Bull's N. P., 83; 10 Co., 51; The Marshalsea case; see also *Oakley* v. *Aspinwall*, 3 Comst., 547, and cases cited.)

V.

In conclusion, we submit, with confidence, that the authorities cited conclusively show—

(1) That a court-martial, including one judge who had preferred charges to be tried by said court, and who was the sole witness to sustain the same, was illegal, and its judgment *absolutely void.*

defendant was on trial for murder, and expressly consented to proceed to trial before eleven jurors, that such trial was irregular and void; that the consent of the defendant was void because, under the Constitution, a trial by jury—that is, by twelve jurymen—was assured; and that the consent of the defendant, that eleven jurymen should pass upon his case, could not take away the constitutional guaranty of trial by jury—that is, by twelve jurymen.

Jurisdiction, when not conferred by law, cannot be acquired by consent of parties.

Dobson v. *Scaggs*, 47 Mo., 285.
Coves v. *Ward*, 47 Mo., 289.
Nazro v. *Cragin*, 3 Dillon, 474.

Sedgwick on Statutory and Constitutional Law, page 109, says: "So it is well settled, that not even the most formal and solemn consent can give jurisdiction to a court not authorized to take it. And whenever the objection is raised, *although it may be a breach of faith and good morals* to insist upon it, still it will be fatal."

In Coffin *v.* Tracy, 3 Caine's Rep., 129, the court said: "Consent will take away error, but neither that nor *confession* will give *jurisdiction*."

In *Dudley* v. *Mayhew*, 3 Coms., 12, the court say:

"It has been long and correctly settled that not even a direct assent by the parties can confer jurisdiction, or render the judgment of a tribunal, in a matter over which it has not by law any cognizance, effectual."

See also *Davis* v. *Packard*, 7 Pet., 275.

In *Oakley* v. *Aspinwall*, 3 Coms., 547, which was a case where one of the judges of the Court of Appeals of the State of New York was of consanguinity to one of the parties, and sat on the hearing of the case in court *by the consent of the parties*, it was held that the court *had not jurisdiction*, and the judgment was vacated.

Hurlburt, Justice, in delivering the opinion of the court, says:

"The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be both *judge and party, arbiter and advocate*, in the *same cause*. *Mankind are so agreed in this principle* that any departure from it *shocks* their common sense and sentiment of justice. It was long ago reported, on the authority of Holt, that the mayor of Hertford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, although he by the charter was sole judge of the court." (1 Salk., 396.)

* * * * * *

"It was, however, urged at the bar, that although the judge was wanting in authority to sit and take part in the decision of this cause, yet that, having done so *at the solicitation of the respondent's counsel*, such consent warranted the judge in acting, &c.

"But the court said, where no jurisdiction exists by law it cannot be conferred by consent, especially against the prohibitions of a law which was not designed merely for the protection of the party to a suit, but for the general interests of justice." (See also *Low* v. *Rice*, 8 Johns., 409; *Clayton* v. *Perdun*, 13 Johns., 218; *Edwards* v. *Russell*, 21 Wend., 63; 21 Pick., 101.)

III.

Again, it is said:

"The punishment could have been justified by the finding of the court upon those charges which Colonel Merritt did not prefer, and in regard to which he did not testify."

The proceedings by which Lieutenant Keyes was convicted and sentenced to dismissal from the service embraced several charges and specifications, upon each of which he was found guilty and sentenced to be dismissed.

It is impossible to determine from this record upon what particular charge the sentence rested. Therefore, if the court as constituted was incompetent to hear and deter-

mine any one charge made, it must follow that the sentence which rests upon the general conviction upon all the charges cannot be sustained. All the officers constituting the court must be presumed to have conferred together in regard to the judgment to be rendered and the sentence to be pronounced.

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(1) That a court-martial, including one judge who had preferred charges to be tried by said court, and who was the sole witness to sustain the same, was illegal, and its judgment *absolutely void.*

(2) That the claimant not excepting to the improper construction of the court did not render the court properly constituted.

(3) That the fact that any one charge entering into the conviction and sentence of dismissal was preferred and *proved* by a member of the court, renders the whole proceeding void.

(4) That the accused pleading guilty to any one charge, with its specifications, did not give jurisdiction to the court or cure the infirmity of its constitution.

(5) And that the determination and sentence of the court in this case was and is absolutely void.

From this, it results that Lieutenant Keyes, who was duly nominated to the Senate, and by the Senate confirmed, and by the President commissioned as lieutenant in the army, continues to hold such office.

And it is respectfully submitted, that the proceedings of the court-martial in question being absolutely void, Lieutenant Keyes is entitled to the position in the army he would have held if no such proceedings had been had, and to recover the amount of his claim as set forth in his petition.

JAMES COLEMAN,
Of Counsel for Appellant.

109-336

OFFICE SUPREME COURT U. S.
FILED
JAN 8 1881
JAMES M. McKENNEY, CLERK.

In the Supreme Court of the United States.

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} No. 982.

BRIEF FOR APPELLEE.

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Additional facts are, that one of the nine members constituting the court had preferred the fourth charge and specifications, and that upon the trial said member was sworn as a witness on the part of the government

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Additional facts are, that one of the nine members constituting the court had preferred the fourth charge and specifications, and that upon the trial said member was sworn as a witness on the part of the government

and gave testimony in support of the charge and specifications preferred by him, and afterwards resumed his seat as a member of the court.

Further, the accused was asked, when put on trial before the court and before the members thereof were sworn, whether he had any objection to any member named in the order convening the court, and to this interrogatory he replied in the negative. Accused was allowed counsel, who was present during the trial; and at the close of the evidence accused submitted to the court in writing a statement of his defense, which was read, and which contained no objection or reference to the participation as a member of the court of the officer who had preferred one of the charges, or to his having been sworn as a witness.

The record also shows that subsequent to the execution of the aforesaid sentence the President, by and with the advice and consent of the Senate, appointed another to be first lieutenant Fifth Cavalry in express terms, *vice* appellant "dismissed." This appointment took effect June 15, 1877, and has not since been vacated.

This suit is for the amount of the salary of the office of first lieutenant of cavalry (formerly held by Keyes, the appellant) from April 28, 1877, to the filing of his petition below. His claim is, therefore, upon the assumption that he never ceased to hold the office in question, and recovery cannot be granted him unless that assumption be affirmed.

Defendants maintain—

First. That claimant was dismissed by the President in pursuance of the sentence of a court-martial duly con-

stituted and having jurisdiction, and these facts appearing, conclude his right.

Second. Even if the order of dismissal was not in itself effective, it became so by the President's appointment of a successor by and with the advice and consent of the Senate.

I.

Claimant, while not disputing that the subject of the charges were exclusively cognizable by a general court-martial,and that such a court had jurisdiction of his person, asserts that the judgment proved by defendants was illegal and void, and the consequent orders and acts purporting to dismiss him from the service were unauthorized and ineffective. This because one who had preferred a charge became a member, and, being a member, testified at the trial.

These facts are not sufficient to overcome the effect of a judgment of a court created for the purpose and with the duty of determining—as is not contested—accusations such as these when made against one of the class which included claimant.

It is well settled, that however irregular, improper, or erroneous the proceedings in any case, civil or criminal, may have been, after they have once passed into final judgment by the decision of the ultimate revisory tribunal or authority, the judgment is as absolutely valid in law as if no error whatever had been committed, provided only the court had legal jurisdiction of the subject matter and of the person of the accused. (*Thompson* v. *Tolmie*, 2 Peters, 157; *Voorhees* v. *Bank U. S.*, 10 Ibid., 449; *Cornell* v. *Williams*, 20 Wall., 250.)

From the operation of this rule courts-martial have

in no instance been exempted. Mr. Attorney-General Nelson expresses the application and conclusive effect of the doctrine in the case of Passed Midshipman Moorehead (4 Opin., 275): "The facts disclosed by the record show it to be one in which the sentence pronounced was peculiarly harsh and severe. The proceedings of the court held in his case I do not deem it necessary particularly to discuss; I have no difficulty, however, in stating that they were exceedingly irregular. Testimony manifestly illegal was admitted, whilst that which was legal was ruled to be inadmissible. But still I do not perceive how these irregularities can be regarded as annulling the judgment pronounced. They might have been appealed to as reasons why the revisory power when called to act upon the proceedings should not have approved the finding and sentence of the court; but that approval having been signified they cannot avail wholly to avoid anything that has been done. The judgment of the tribunal created by the law has been pronounced and carried into effect, and the officer upon whom it operated was thenceforth unquestionably out of the service."

And in *ex parte* Reed (100 U. S. Repts. 23) this court extended affirmatively the doctrine to courts-martial.

"The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collateraly impeached for any mere error or irregularity, if there were such, committed within the sphere of authority."

Now, the grounds upon which claimant seeks to impeach the judgment which enters indirectly into this

case, go to the constitution of the court-martial and to the regularity of its proceedings. But defendants urge that, under the principles recognized and declared by this court, facts will not be held to constitute a ground for such impeachment which do not show a non-observance of the positive laws which authorized the court-martial and prescribed its duties and modes of procedure; and, therefore, when the record affirmatively shows that the court was convened as the statute requires, was composed of the expressed number of officers of the required rank, that in the organization, deliberation, verdict, and sentence each and every requisite of the statutes was observed, and when further, as in this case, the only allegations are those respecting which there is no statute or article of war, this court will hold jurisdiction was complete and the judgment conclusive.

II.

Claimant argues that courts-martial being courts of limited and special jurisdiction it must be affirmatively shown that they acted upon a case clearly within their jurisdiction and that their proceedings were strictly regular.

If the view taken by defendants be accurate this proposition is entitled to no prominence in the case, for the facts found by the court below show fully everything contemplated or intended thereby. The constitution, powers, jurisdiction, and mode of procedure of a general court-martial are explicitly prescribed by law. The facts found show that a general court-martial was constituted, acted upon the subject, and in the mode strictly as the law authorized and enjoined.

Is not the result prescribed by the law to follow when

the methods by which the law declares a result is to be attained are each and every one observed?

To such extent the proposition asserted by claimant may be conceded and it has been fully satisfied in this case as is manifest by the record.

But if his proposition intends that in justifying by the judgment of a special tribunal there must be affirmatively shown anything more than a strict compliance with the express laws which brought such tribunal into being and regulated its powers, it is not a correct deduction from the cases cited or from any others.

The adjudged cases are all wherein the judgment was impeached, solely because either there was no law whatever authorizing the court, or, such law existing, its express conditions as to constitution or jurisdiction had not been observed.

A strict compliance with common-law principles has never been demanded, but the inspection has always been where a particular statute was involved. *The* body authorized by law to render judgment had never acted, because the officer designated by the law as a member of the court was in fact not an officer; the judgment was not conclusive, because no law could be shown authorizing the court-martial; or because a law authorizing courts-martial in certain cases did not, in the view of the collateral court, authorize one in the particular case.

Such were the points in the leading cases cited for claimant of *Brooks* v. *Adams*, 11 Pick., 440; *Duffield* v. *Smith*, 3 Serg. & Rawle, 589, and *Mills* v. *Martin*, 17 Johns, 7.

And it is submitted that the doctrine is entirely novel

and without force, that there are any other tests of the jurisdiction or regularity of a special tribunal than those which are to be found in the laws which authorized it.

Equally disconnected with this case is the principle that no man can be a judge in his own cause; and should this court deem that Colonel Merritt's position as a member after he had preferred one of the charges can receive consideration, defendants urge that such participation was not by one who had any legal interest in the cause, nor was it contrary to, but in accordance with, principles and customs prevailing in military courts.

The principle asserted is drawn entirely from cases where the judge, to whose presence objection had been taken was, also, either a party to the suit, or might be affected in his right by the result of the same. The cases wherein his participation invalidated the proceedings were not only where in its course or final issue it would be necessary for the judge to pass upon his own rights and material interests, but where an express statute forbade his sitting.

In the face of a statute jurisdiction would not obtain, even by consent, but the doctrine does not disqualify that judge whose interest can be no more than that of each of his associates—at most an earnestness that justice be done.

That material advantage might by no possibility affect the members of a court-martial, the laws look out that an officer is to be tried by his superiors. Thus a verdict of dismissal would not give chance for promotion to any one joining in such a verdict, and the one possibility for private advantage is removed.

All that is urged is in effect that Colonel Merritt be-

came a member when he had personal knowledge of an issue. If knowledge of such character incapacitates an officer, justice would often be avoided, for because of the considerable number of officers superior to the accused which the constitution of a general court-martial requires, such a court could in many situations be either not at all, or with great difficulty, convened. Again, the laws do not expect the members of such a court will be as free from personal knowledge of the subject as in civil tribunals. Passed with the existence of that rule of service which restrains an officer from the society of inferiors, the laws recognize that the associates of an officer must be officers, and in prescribing that an officer's judges must be from the class of which are his associates, they expressly permit those to be judges who, from the nature of the service, are most likely to have personal knowledge of the daily habits and acts of the accused.

"But though the custom of courts of civil judicature must have great weight in justifying the customs of courts-martial, and although the rule of evidence in courts of common law ought to be admitted by courts-martial as being the law of evidence; yet in matters relating to the constitution of the court, and to the ordering of its proceedings, courts-martial must be guided by their own peculiar customs, which, when they differ from the ordinary forms in courts of common law, may generally be traced to have originated in peculiar circumstances, incidental or inseparably attaching to courts-martial." (Simmons, p. 227.)

There being no law disqualifying a member who has preferred charges, his participation did not deprive the court of jurisdiction, and was a matter which might have

been called to the attention of the reviewing authority, to affect his action in approving the sentence. Likewise it was a point which it was competent for the accused to waive as he did, and, having consented to be tried as he was, he cannot now in an indirect proceeding in another court having no authority to hear and determine accusations against the articles of war, claim an advantage which he waived at the trial.

As the court below declared, his action here is analogous to a consent given by a defendant to be tried by a jury, one of whom, when examined as to his qualifications as a juror, declared that he had formed and expressed an opinion that the defendant was guilty. In such a case no effective claim could be made that the jurisdiction of the court was thereby lost.

Jurisdiction therefore attached to the court as it was constituted, and everything done within the power of that jurisdiction, when collaterally questioned, must be held conclusive. (*Cornell* v. *Williams*, 20 Wall., 250.)

Much of the preceding reasoning upon which defendants uphold the presence of Colonel Merritt as a member justifies his subsequent conduct as a witness. His functions combined that of judge and juror, and practice has ever permitted either to testify. It is not only necessary to insure justice and not contrary to law and practice but is a positive duty, and, as we claim, it is particularly necessary and important in military courts that such knowledge be imparted at the trial. It would, doubtless, be desirable if such a witness could in safety to justice be dispensed with, as the mind of the convicted can never be free of the suspicion that there was a bias against him by such a trier; but when, as here,

the only witness is a judge, the propriety and duty of testifying is unquestioned.

Mr. Greenleaf thus states the rule:

§ 487. "The rules in regard to the competency of witnesses are the same in courts-martial as the courts of law. Hence, as we have seen, the prosecutor is admissible as a witness, as, also, are the members of the court. But it is to be observed that the court cannot receive in private any communication in the nature of testimony from one of its members; neither ought his private knowledge of any fact to influence his decision in the cause; but if he knows any fact material to the issue he is bound to disclose it to the parties or to the court, that he may be called and sworn as a witness. He is not thereby disqualified from resuming his seat as a member of the court; but when there is a sufficient number of members without him to constitute the court, it is now in accordance with the usage in civil courts that he should withdraw."

The text writers unite in this doctrine.

"It does not seem incompatible that such a member (who sits in the united capacity of judge and juror) be sworn in open court and after having given his testimony to the matter of fact at issue, that at court-martial, upon the same principle as a juror, he may resume his seat as a member of the court." (2 McArthur, 89; see also Maltby, 48; 2 Hawk., c. 46, 517; Kennedy, 109; Hughes, 63; Tyler, 270; Simmons, 304; Macomb, §129; Ives, 333.)

III.

It is further contended that as the right to recover depends wholly upon the question of whether or not ap-

pellant was removed from office, that question is not a competent subject for inquiry and determination in a proceeding of this nature.

The power of appointment and removal is vested in the President and Senate, and when exercised is a completed act in the nature of a judgment executed. Though the removal may be irregular and illegal, no tribunal has been authorized to reverse it, nor can any court supervise and direct the use of that power. What cannot directly be accomplished, cannot by an indirect suit which must turn upon that issue.

In this case the President nominated a successor in the Army expressly in the place of this appellant; so the Senate confirmed the nomination, and that appointee has since occupied the very office which appellant here claims to be his.

Such an appointment *removed* Keyes (*Ex-parte* Hennen, 13 Pet., 230), not *dismissed* him, as that expression intends in the act of 1866 (14 Stats., 92), and could this statute be otherwise appealed to as insuring appellant from a dismissal it could not protect him against removal, since it does not relate to removals occasioned by an appointment of the President by and with the advice and consent of the Senate.

CHAS. DEVENS,
Attorney-General.
GEORGE C. WING.

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